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JUN 3 1950
CHARLES ELMORE CROPL
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 740

LENA SIMONSEN,

Petitioner,

vs.

JOHN W. EMMERLING, Trustee of
FRANKLIN BUILDING COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER, LENA SIMONSEN

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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The trustee attempts to distinguish this case from the Becker case claiming that the debtor here was not a going concern when Simonsen purchased his bonds whereas Calton-Crescent Inc. was such when its bonds were purchased.

We have already dwelt on the similarity in the facts of the two cases (also shown by counsel for the respondents Schroeder in petitions #761 and #762), but because the respective financial conditions of the two corporations involved are stressed as factors making the difference in the cases, we desire to call attention to the entire absence of any finding or opinion comment by the lower courts on the extent of the debtor's insolvency, or any reference to a relationship between extent of insolv-

ency of the debtor and the conduct of the members of the committee. The state or extent of insolvency of the debtor at the time of the purchase of the bonds in question was not a factor in the lower courts' determination that the claim on the bonds was to be limited-to-cost of acquisition. They were influenced by and their decisions were based solely on the rule in Magruder vs. Drury.

Such lower court findings and opinion comment as were made of the conduct of the committee members in their relationship and duties to bondholders stress good faith conduct on their part, and in themselves conclusively negative any suggestion of disloyalty or any belief by those courts that extent of insolvency was a factor in their decisions. The results obtained for the bondholders—a better result than in the Becker case by 3½ to 1—aside from other evidence of their efforts and vigilance in the bondholders' interests, speaks volumes for the committee's sincerity and unaffected loyalty, and makes the case for full allowance of the claim stronger than the Becker case.

This court's opinion in the Becker case sets no rule of thumb, or mathematical formula, as to just at what point of insolvency of a corporation a director must cease buying the securities of his corporation or face an inference of disloyalty. As we read the opinion, the limitation-to-cost doctrine in such cases is to be applied only in the case of bad faith conduct on the part of the fiduciary, that evidence of extent of insolvency at the time of acquisition of the corporation's securities may be evidence of bad faith, but is not, in and of itself, conclusive, and particularly when all other evidence proves the utmost of good faith.

We see in the efforts of the Securities & Exchange Commission here to sustain the decision of the courts below a determination to have at least one Appeals Court opinion to point to in the future as approving its contention, so strenuously insisted on in the first Chenery and the Becker cases, that the rule in Magruder vs. Drury is the proper rule to be applied in corporate reorganization proceedings. If the Appellate Court's decision is permitted to stand, it can and will, in the light of its dating, be used to confuse the courts.

If such good faith conduct and result to bondholders as in the case at bar can be disregarded by the courts, and disloyalty inferred irrespective of them, then we can conceive of no case where it will be proper to allow in full claims of directors or committee members in reorganization proceedings. The decisions of this court in the first Chenery and Becker cases will be rendered meaningless.

The error of the Appellate Court is so patent that we believe the petition should be granted and the judgment be reversed instanter.

Respectfully submitted,

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